No. 14978

United States
COURT OF APPEALS
for the Ninth Circuit

THE GRAY LINE COMPANY, a corporation,
Appellant,

vs.

R. C. GRANQUIST, District Director of Internal Revenue,
Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

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INACCURATE FACTUAL STATEMENTS

Appellee has made inaccurate statements of fact in his brief. For example, Appellee says that passengers being brought from the airport were delivered at any place or places other than those designated in the Portland downtown area, provided such place or places were in the general direction between designated points (B.* 8). The uncontradicted evidence, however, shows that there

*The letter B as herein used refers to Appellee's brief.

were no designated places as such to which passengers being brought from the airport were regularly delivered in downtown Portland or elsewhere. On each trip each passenger going downtown instructed the limousine driver where in the downtown area to deliver him. Each passenger had this right without any limitation, and the discharge places in the downtown area varied from day to day (Tr. 72, 73, 77, 88, 90).

Under the heading "Summary of Argument", Appellee states that Appellant and not the passengers determined the pick-up points and the routes between such pick-up points and the airport (B. 13). This statement is directly contrary to the stipulated facts (PTO 10, 12, Tr. 24, 25), the evidence (Tr. 83) and the findings prepared by Appellee and approved by the court (Findings 10, 13, Tr. 45, 46) as shown in Appellant's brief at page 30. The evidence conclusively established that the drivers on their own initiative and not the Appellant determined the route and streets upon which to travel going to and from the airport (Finding 20, Tr. 48, 75, 76, 83, 87, 89, 90), and that the routes varied from day to day and trip to trip (Tr. 83, 87, 90).

Appellee refers to "appellant's limousine operation carried on in Seattle" (B. 14), and to "appellant's limousine operations in Seattle" (B. 32), claiming that the nature of Appellant's airport limousine service was considered and passed upon in *Royce et al. v. Squire,* 73 F. Supp. 510 (D.C.W.D. Wash. 1947). Appellant has never engaged in the airport limousine business in the City of Seattle, Washington, and was not a party to the *Royce* case.

Reply to Appellee's Argument headed: "I. The District Court correctly concluded that Appellant's vehicles were operating on an established line, and that its fares were subject to the transportation tax under Section 3469 (a) of the 1939 Code" (B. 15).

At the outset Appellee's entire argument on this point is based on an erroneous premise. In order to fit Appellant's airport limousine service into the language of Section 130.58 of Treasury Regulations 42, Appellee found it necessary to surmount among others the obstacle which was raised by the requirement that the operation be "between definite points". To accomplish this, Appellee took liberty with the facts.

Appellee states that "definite points" existed, to-wit: Portland International Airport and the downtown area of Portland (B. 17). Appellee ignores the true facts that Appellant's operations were between indefinite, not definite, points in the downtown area of Portland, which points varied from trip to trip, and the Airport with respect to outgoing trips, and between the airport and various indefinite points in the Northeast and the downtown areas of Portland with respect to incoming trips.

The downtown area of Portland contains apprixi-mately 520 acres.[1] The area in which passengers would be delivered on the East side of Portland is even larger in scope.

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[1]Exhibit 13 is a Map of the City of Portland. The downtown area bounded by Columbia Street on the South, 16th Avenue on the West, the Railroad Depot on the North, and the river on the East, scales to approximately 22,640,000 sq. ft., or 520 acres.

The "downtown area of Portland" is one of the so-called "definite points" referred to by Appellee. That is not a definite point within the meaning of the Regulation. As used in the Regulation, the term "definite points" means points between which a transportation company's vehicles are driven to pick up or discharge passengers, as well as points to which passengers desiring transportation will go in order to get on the same, and to which passengers will be delivered. These points constitute "points" within the meaning of the Regulation. A highly developed municipal area of 520 acres, divided into blocks 200 feet square, in which area there are any number of indefinite places at which a limousine company will pick up and discharge passengers, does not constitute a point. If airline passengers were informed by the airline company that they will board the limousine in "the downtown area of Portland", they would not know where to go to get on the vehicle. Certainly they cannot see from place to place within the area as they might do in looking across an open area. In the latter case they might be able to see a vehicle anywhere in a large area. They can't do that in downtown Portland. Likewise if a driver were told to pick up a passenger in the "downtown area of Portland", where would he go to find the passenger? Appellee's selection of the "downtown area of Portland" as one of two alleged "definite points" is nothing more than a distortion of the facts made in order to try to fit them into the framework and requirements of the Regulation.

Appellee has attempted to buttress his argument on this issue with other inaccuracies. Thus east side dis-

charge privileges were inaccurately stated to have been limited on trips from the airport to east side points "contiguous to" or "along the general route" towards downtown (B. 18, 17), the inference here being that there was a route. Appellee cited pages 70-72, 75, 76 and 77 of the transcript of record as his authority. An examination of those pages shows that the only requirement was that the discharge places on the east side be in the general direction of downtown. Evidence conclusively established that there was no route as such, and that insofar as discharge privileges of the east side were concerned, the drivers would leave the streets on which they were traveling in order to discharge passengers at any place designated by the passengers in the general direction of downtown Portland (Findings 11, 20, Tr. 46).

Appellee also stated that the limousine drivers controlled the time they picked up the passengers (B. 18). This is an inaccurate statement. The passengers were notified by the airline company, upon making arrangements for limousine transportation, "of the time when . . . the limousine would depart" (Finding 10, Tr. 45).

The evidence established that Appellant did not operate its limousines "on an established line" within the meaning of Sec. 3469 and of the Regulation. Congressional intent must be determined only by construing the word "established" in context. It is used in conjunction with line, thus—"established line". Even Appellee concedes that as used in the Regulation, "established" means "permanent", "recurring" or "regular" (B. 19),

and that a "line" requires, in itself, regularity. Therefore, an "established line" must require more than mere regularity—it must have permanence if an "established line" is to be more than a "line".

Appellee cites *Wells Lamont Corp. v. Bowles,* 149 F. 2d 364 (Em. App. 1945), which involved a violation of OPA ceiling prices, and in which the court, construing the term "established practice" stated:

> ". . . To establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or to fix unalterably." 149 F. 2d at 366.

This case clearly supports Appellant and shows that "established" means firm, permanent or unalterable, and as used in the term "established line" means a line having a firm, permanent, and unalterable existence. Also, see *Public Utilities Commission v. Pulos,* 75 Utah 527, 286 Pac. 947 (1930), quoted at page 37 of Appellant's brief, which holds that in cases wherein transportation is concerned, an established route or line, in addition to other requirements, is one "that has a legal existence". Appellant's limousine service had no firm, permanent, unalterable or legal existence. It continued solely at sufferance and could be discontinued at will in the case of two of the airlines, and on thirty days' notice in the case of the third (Tr. 69, 70, 106).

The cases cited by Appellee on page 20 of his brief support Appellant's contention that a "line" which lacks legal existence is not an "established line" within the meaning of Sec. 3469. Thus, in *Regenhardt Const. Co. v. Southern Ry.,* 297 Ky. 840, 181 S.W. 2d 441, the court

stated that "in railroad parlance, 'a line' is an operating unit under one management *over a designated way or right of way*" (emphasis supplied). In *Tuggle v. Parker,* 159 Kan. 572, 156 P. 2d 533, the court held that a taxicab company was engaged in operating a motor transportation business but was not within the provisions of a statute relating to a "motor transportation line". These cases show that, where transportation is concerned, "a line" requires something more tangible than on operation such as conducted by Appellant.

Appellee does not contend that the words "established line", as used in Sec. 3469, have any meaning other than that set forth on pages 34-38 of Appellant's brief. Appellee's contention seems to be that, irrespective of the language of the statute, the Regulation is controlling. This obviously is incorrect. The Regulation must be construed to give effect to the language of the statute, as it does not have the force and effect of a congressional enactment unless its requirements are within the scope of the statute. But, even were Appellee's contention correct, the evidence shows that, by the very test set up in the Regulation, Appellant was not operating its limousines "on an established line". This is clearly pointed out at pages 44-47 of Appellant's brief.

Appellee relies upon the doctrine of administrative construction, citing *Brewster v. Gage,* 280 U.S. 327 (1930), and *Maryland Casualty Co. v. United States,* 251 U.S. 342 (1920). In the *Maryland Casualty* case, the court stated that a regulation "has the force and effect of law *if it be not in conflict with express statutory*

provision" (Emphasis supplied). In the *Brewster* case, the court held merely that the interpretation of an ambiguous or doubtful statute by officials charged with its administration will not be disturbed where the interpretation "is reasonable and does no violence to the letter or spirit of the provisions construed", and where a "reversal of that construction would be likely to produce inconvenience and result in inequality". These cases clearly do not support the proposition for which Appellee cited them.

The construction urged by Appellee is not controlling in this case. Appellee's interpretation of the regulation "does violence" to the letter and the spirit of Sec. 3469, and is, therefore, not reasonable.

There is no logic to the argument propounded on pages 20 to 22 of Appellee's brief. Both Section 500 of the Revenue Act of 1917, c. 63, 40 Stat. 300, and Art. 39 of Treasury Regulations 49 promulgated thereunder applied to motor vehicles operating "on a regular established line when in competition with carriers by rail or water". The language there used is different than that employed by Sec. 3469 and by Sec. 130.58 of Regulations 42. There is nothing to indicate that a regulation promulgated in connection with a statute first passed in 1917, and then repealed in 1921 had such legislative approval as to have "the force and effect of law" with respect to a statute enacted in different terms a generation later.

The tax on transportation was repealed by Section 1400 of the Revenue Act of 1921, c. 136, 42 Stat. 227. For the next twenty years there was no statute taxing

the transportation of persons by motor vehicles. The enactment of the tax on transportation of persons as part of the Revenue Act of 1942 did not constitute a reenactment of the earlier statute.

The cases cited by Appellee on page 23 of his brief are of no benefit to him as they are not applicable here. In *Wilmett Park Dist. v. Campbell,* 338 U.S. 411 (1949), there had been a long continued administrative construction followed by repeated reenactment of the relevant language without change in the Revenue Acts of 1918, 1921, 1924, 1926, 1928, 1932, 1935, 1939, 1941. Thus, the case concerned a regulation in effect for more than 20 years. The same situation existed in *Crane v. Commissioner,* 331 U.S. 1 (1947), *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U.S. 110 (1939), and *Helvering v. Winmill,* 305 U.S. 79 (1938). In the *Crane* case, there was a dispute concerning the interpretation of the word "property" as used in the Revenue Act of 1938. The opinion mentioned the regulation involved as having been in effect since 1918, and stated that the regulation may be considered to have the force of law "as the relevant statutory provision has been repeatedly reenacted since then in substantially the same form". The report of the case foot-noted the quoted sentence by citing the Revenue Acts of 1921, 1924, 1926, 1928, 1932, 1934, 1936 and 1938.

It is noteworthy that in the *Crane* case, *supra,* the Court stated:

> ". . . In the first place, the words of statutes—including revenue acts—should be interpreted where

> possible in their ordinary, everyday senses." 331 U.S. at 6.

In that case the Supreme Court found that the Commissioner's regulation was in harmony with this statement. The everyday meaning of the term "operated on an established line" is set forth on pages 35 through 38 of Appellant's brief, and Appellee did not point to any case holding otherwise. His only case dealing with the term is the *Wells Lamott* case, *supra,* which as shown tends to support Appellant rather than Appellee.

In *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U.S. 110 (1939), the sole question was whether gain to a corporation on the purchase and resale of its own shares constituted gross income within the meaning of Section 22(a) of the Revenue Act of 1928. The Court felt that the section was so general in its terms as to render an interpretative regulation appropriate, and stated as follows:

> "The administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the Revenue Acts from that of 1913 to that of 1932, as evidenced by Treasury rulings and regulations, and decisions of the Board of Tax Appeals. In the meantime successive revenue acts have reenacted, without alteration, the definition of gross income as it stood in the Acts of 1913, 1916, and 1918." 306 U.S. at 114.

The court, in its footnote, referred to the Revenue Acts of 1913, 1916, 1918, 1921, 1924, 1926, 1928, 1932.

The *Winmill* case, *supra,* involved the interpretation of Section 23 of the Revenue Act of 1932. A regulation

specifying the treatment to be given certain commissions paid by a taxpayer was issued under this act. Regulations promulgated under the 1916 act were substantially the same as the 1932 regulation. With respect to the 1916 regulation, the court said:

> ". . . This interpretation has consistently reappeared in all regulations under succeeding tax statutes . . . it is significant that Congress substantially retained the original taxing provisions on which these regulations have rested." 305 U.S. at 82.

In a footnote, the court cited the interpretative regulation under succeeding statutes in the years 1918, 1921, 1924, 1926, 1928, 1932, 1934 and 1936.

Thus, in the *Willmett Park, Crane, Reynolds Co.* and *Winmill* cases, a statute in substantially the same form was in constant effect by virtue of various reenactments. Obviously, the fact that there was no statute taxing the transportation of persons by motor vehicles for more than twenty years makes the doctrine of the cases cited by Appellee inapposite, for in each of said cases the statute had been constantly in force and the provision constantly reenacted. The enactment of Sec. 3469 in 1942 clearly did not signify legislative approval of a regulation long since forgotten.

A case more on point than those cited by Appellee is *Janney et ux. v. Commissioner,* 108 F. 2d 564 (3d Cir. 1939), affirmed, *Helvering v. Janney et al.,* 311 U.S. 189 (1940), where a regulation was promulgated under the Revenue Act of 1934. The particular section of the 1934 act to which the regulation related was reenacted in 1936 and, in changed form, in 1938. The regulation was

not changed during this period. The Third Circuit held that the rule of administrative construction was not applicable, stating

> ". . . In most of the cases where the rule has been invoked the administrative act has been approved by successive enactments without change, and emphasis is laid, in the application of the rule, on the extended continuity of the construction . . ." (108 F. 2d at 567).

Where twenty years elapse, there is no rule that infers "legislative approval" of a short lived regulation long since dead.

Appellee states that "Section 3469 of the 1939 code has been changed both as to rates and as to substance" since 1941 (B. 23). The changes made by the Revenue Acts of 1942, 1943 and 1954 effected only the tax rate. The 1949 change added a sentence not related to the provision with which we are concerned. The 1950 Act expanded the coverage of the transportation tax without mention of the provision exempting transportation of persons by motor vehicles having a seating capacity of less than 10 persons, and the Revenue Act of 1951 added an exemption on certain foreign travel. It is submitted that *a specific change does not constitute a reenactment of unmentioned and unrepeated provisions.*

In each instance, cited by Appellee (B. 23), there was a specific amendment of the statute for a specific purpose, and not a reenactment thereof. In no instance did Congress reenact or amend the provision relating to the exemption from the transportation tax of motor vehicles having a passenger seating capacity of less than

10 passengers. A change of a provision of a tax statute is quite different from a reenactment thereof. In cases of reenactement, there may be the inference that all provisions and published administrative interpretations of a statute are considered by Congress. No such inference arises with respect to a specific amendment.

Defendant concludes this phase of his argument with citations to cases including one not herein previously considered, namely, *Massachusetts Mutual Life Insurance Co. v. United States,* 288 U.S. 269 (1933) (B. 23). Like the other cases cited by Appellee and for the same reasons, this case can give no comfort to the Appellee, as there again, there was a statute reenacted from time to time, but at all times in force from the date of its original enactment in substantially the same form. Obviously this is not so in the case at bar.

In view of the differences in the facts, the *Wilmett Park, Crane, Reynolds Co., Winmill* and *Massachusetts Mutual* cases obviously do not support the points for which they are cited by Appellee. The true rule with respect to the force and effect of the regulation is stated in the cases cited on page 42 and 43 of Appellant's brief[2] and in *Janney et ux v. Commissioner,* 108 F. 2d 564 (3d Cir. 1939), aff'd 311 U.S. 189 (1940); *Jones v. Lib-*

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[2]Morrill v. Jones, 106 U.S. 466 (1882), Smith v. Commissioner, 142 F. 2d 818 (9th Cir. 1944), New Idria Quicksilver Mining Co. v. Commissioner, 144 F. 2d 918 (9th Cir. 1944), Hawke v. Commissioner, 109 F. 2d 946 (9th Cir. 1940), Allis v. LaBudde, 128 F. 2d 838 (7th Cir. 1942), and Commissioner v. Van Vorst, 59 F. 2d 677 (9th Cir. 1932).

erty Glass Co., 332 U. S. 524 (1947); and *F. W. Woolworth Co. v. United States,* 91 F. 2d 973 (2d Cir. 1937).

The so-called doctrine of legislative acquiesence in administrative or judicial construction of a statute cannot in and of itself result in a conclusive interpretation of the statute. It cannot bind the court. In *Jones v. Liberty Glass Co., supra,* the Supreme Court of the United States said:

> ". . . the doctrine of legislative acquiesence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions." 332 U.S. at 533, 534.

In the *Janney* case, *supra,* the court stated:

> "But administrative regulations are not conclusive, but are at most decisions which can be changed, and afford to the courts in the ultimate test nothing more than persuasive rules of construction. It has never been said that administrative action removes the statute from the field of judicial construction." 108 F. 2d at 567.

In *F. W. Woolworth Co. v. United States, supra,* Judge Learned Hand stated:

> ". . . To suppose that Congress must partciularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already. While we are of course bound to weigh seriously such rulings, they are never conclusive." 91 F. 2d at 976.

The record shows that Appellant's airport limousine service was operated only as an irregular route carrier under Oregon law (Ex. 12; Or. Laws 1947, c. 467; Or. Laws 1949, c. 488). It did not operate from a fixed termini over a regular route upon fixed schedules (Findings 20,

Tr. 48, 49, 68, 75, 76, 82, 87, 90, 91). The cases cited by Appellee on page 24 of his brief do not relate to Federal tax consequences arising out of state laws, but are concerned with the effect of rulings and requirements of the Interstate Commerce Commission.

In the last paragraph beginning on page 24, Appellee repeats his oft made statement that the material facts of this case are similar to those of *Royce et al. v. Squire,* 73 F. Supp. 510 (D.C.W.D. Wash. 1947) as if constant repetition will make it so. As an example of such material similarities, Appellee states that "in both cases the passengers were picked up only at certain designated places" and "the drivers were free to select the route to the airport". Appellee has again taken liberty with the facts. It is not correct to state that passengers were picked up only at "certain" designated places. They would be picked up by Appellant at any place in the downtown area where passengers instructed the airline they desired to board the limousine (Finding 10, Tr. 45, 83). As for the second point, the Seattle drivers were instructed to follow the most direct route going to or from the airport (Royce Finding XII, 73 F. Supp. at 512). Appellant gave its drivers no such instructions (Finding 20, Tr. 48, 74, 86, 90).

The difference between the facts of the *Royce* case and those of the instant case are material and go to the very essence of the issue to be determined by this court. One needs only to read the *Royce* case to realize this.

Appellee does not deny that these differences exist, but, to the contrary, admits they do, and, attempts to avoid

the consequences by stating that the material facts are the same. This confuses no one.

Appellee, on page 25 of his brief, states that "Appellant does not contend that *Royce v. Squire* was wrongly decided by the District Court . . ." Appellant has not felt that it is necessary to make any contention as to the correctness of the District Court decision in the *Royce* case, as the material differences in the facts of this case and those found in *Royce* were shown in Appellant's brief at pages 25-28. Whether the Washington District Court was right or wrong is not material here, as the facts in this case clearly show that Appellant's airport limousine service was not "operated on an established line".

Appellee's repetition on page 26 of the inference that The Gray Line Company, Appellant here, was the party involved in the Seattle case is also unfounded and untrue. Appellee could easily have discovered the truth if he doesn't already know it.

In its final discussion of this issue, Appellee dismissed briefly Revenue Ruling 54-47 (B. 26, 27). There was not much else he could do. It is clearly in point. This ruling was promulgated prior to June, 1954, and is the only published interpretation of Sec. 3469 ever made with respect to whether an airport limousine service such as Appellant's constitutes operating "on an established line". The ruling clearly shows that vehicles operated in a manner such as the Appellant's limousine "are not considered operated on an established line within the meaning of Section 3469". Under this Revenue Ruling,

the essential fact is that the limousine company did not establish the pick-up and discharge points and not necessarily who designates those points.

The ruling in part reads:

> "Where . . . passengers are picked up *or* delivered at any place or places designated by them, as distinguished from fixed pickup and discharge points established by the limousine company, such vehicles are not . . . operated on an established line . . ." (Emphasis supplied).

Under this ruling the operation is not on an established line if either the pickup *or* delivery point is not designated by the limousine company. The reason for this is that the disjunctive "or" is used in the ruling.

In the case at bar, Appellant did not establish "pick-up" points. Prior to each trip to the airport, pickup points for the trip were designated to the drivers by the airline companies after the airline passengers had informed the airline of the points where they wished to board the limousine (Findings 10, 13, Tr. 45, 46, 83). On trips from the airport, the passengers and no one else determined the discharge points.

There were no fixed pickup and discharge points in the present case. Appellee's statement that there were does not make it so. The facts underlying the ruling are substantially similar to the facts of this case. The ruling clearly shows that Appellant's limousines were not being operated on an established line within the meaning of the statute.

Reply to Appellee's Argument headed: "II. The District Court was correct in finding that Appellant had not established that it had borne the burden of the taxes, which is a prerequisite to any recovery by it" (B. 27).

Section 3471 (a) of the Internal Revenue Code of 1939, cited by Appellee (B. 27), does not apply in this case. It applies only in cases where the person claiming refund "collected the tax" from the passengers "and paid it to the United States". In this case, Appellant collected no tax (Tr. 80, 81).

This action is permitted under the sections 3770 (a) (1) and 3772 (a) (1) of the Internal Revenue Code of 1939.

Section 3770 (a) (1) provides, in part, as follows:

> ". . . the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected."

Section 3772 (a) (1) provides:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected *until a claim for refund or credit has been duly filed with the Commissioner,* according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." (Emphasis ours).

Section 130.78 of Treasury Regulations 42 provides, in part, as follows:

> "Where a collecting agency has erroneously or illegally overpaid from its own funds any tax, the collecting agency may claim a refund of such overpayments."

Appellant collects transportation taxes on account of its sightseeing operations (Tr. 66, 93), so it is a collecting agency within the meaning of the regulation last mentioned.

Appellee ignores the evidence and is wrong in saying that "it is clear from the undisputed facts" that Appellant did not bear the burden of the tax (B. 28). One needs only read the record to discover the truth. All of the facts are consistent with the conclusion that the tax was paid by Appellant from its own funds and was not passed on to the passengers.

Appellant mentions two facts to support its position —the letter from Deputy Commissioner of Internal Revenue, D. S. Bliss dated June 30, 1948 (Ex. 21), discussed at pages 53 and 54 of Appellant's brief, and the fact that a bus was used one time during the month, discussed at pages 52 and 53 of Appellant's brief.

As to the Bliss letter, there is absolutely no correllation between the agreement of August 21, 1949 (Ex. 22), and the letter written by Mr. Bliss. It cannot be even properly inferred that Appellant began collecting transportation tax from its airport passengers just because Mr. Bliss informed Appellant to do so. Appellant's operations did not change after receipt of the Bliss letter. Had Appellant raised its fare in order to comply with that letter, it would not have waited 14 months to

do so, and it would have raised the fare charged airline employees also. The only reason for a fare increase was that costs had increased between 1944 when the 85¢ fare was charged and 1949 when the fare was increased to $1.00.

The waybills (Ex. 2) show that in the predrawn hours of July 20, a bus was used to carry 18 passengers, each of whom paid $1.00. A tax of 15%, or $2.70 is due on these fares, as through inadvertance, Appellee failed to report this amount in its transportation tax returns for July, 1950. There is no penalty due on this, as the omission was obviously an oversight and was not willful.

The evidence does not warrant the erroneous conclusion which Appellee attempted to derive from this isolated incident (B. 29). At the trial, Appellant's counsel mentioned that a tax was owed on account of the fares paid by the bus passengers. Appellant's counsel did not admit the fare included the tax—he merely admitted that Appellant was liable for the tax on account of fares paid by the bus passengers (Tr. 81, 82).

The overwhelming evidence in this case shows that Appellant paid the tax from its own funds and did not pass the burden on to the passengers. Appellant did not collect or attempt to collect any sum as a tax from its limousine passengers (Tr. 80, 81). Nothing was set aside or regarded by it as a tax (Tr. 81). The drivers did not have any discussions with passengers about transportation taxes or tell the passengers that the fares included any transportation tax (Tr. 87, 90, 91). All fares were maintained as a single item of revenue on

Appellant's books, and the entire amount of fares paid by the airport passengers was treated by Appellant as revenue (Finding 28, Tr. 50, 92, 93, Exs. 6, 7, 10). The airlines were billed by Appellant only for the agreed fare and were not billed any additional amount as a tax.

None of the limousine revenue was shown on Appellant's books as a tax obligation (Finding 28, Tr. 50). When the assessment involved in this case was paid, it was paid by Appellant from its own funds (Tr. 82), and was charged to an account called "Other Deferred Debits", and was neither entered nor recognized as a tax liability (Tr. 93).

The foregoing recitation sets forth the facts material to this issue. They are the facts which directly establish that Appellant bore the burden of the tax. They are the facts which distinguish this case from the *Royce* case.[3] They are absolutely contrary to the facts upon which this court in the *Royce* case relied. These differences were shown on pages 50-52 of Appellant's brief. The only factors cited by Appellee have been discussed, and they are collateral to the issue of who bore the burden of the tax. Facts bearing directly on that issue are dismissed by Appellee with hardly a mention, for all those facts, as shown by Appellant, are conducive to only one conclusion—that Appellant bore the burdens of the tax assessment in this case.

Appellee has cited *Coates v. Commissioner,* 161 F. 2d 671 (5th Cir. 1947) (B. 29), and *Cudahy Packing Co. v. United States,* 152 F. 2d 831 (7th Cir. 1945) (B.

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[3]Royce et al. v. Squire, 168 F. 2d 250 (9th Cir. 1948).

30). Both cases involved taxes under the Agricultural Adjustment Act.

In the *Coates* case, the evidence disclosed that the taxpayer added the tax in fixing its price, tried to pass the tax on, and offered no evidence, oral or written, that it did not do so, except the bare statement of its president. In the case at bar, Appellant introduced its records to support the testimony of its witnesses that no tax was passed on to the limousine passengers.

In the *Cudahy* case, the taxpayer admitted that it could not be ascertained from its book whether or not it had shifted the burden of the tax. In view of that the court stated:

> ". . . We have repeatedly held that such statements are insufficient under the statute to furnish a basis for an allowance of refund. . . ." 152 F. 2d at 834.

The court also found that the taxpayer had, on the date of the incidence of the tax, increased its prices by the amount of the tax. That was obviously not the case here, and again points up the distinctions between this case at bar and those relied upon by Appellee.

Appellant not only bore the burden of the tax involved in this case—it also established that fact by uncontradicted evidence. The record leaves no doubt as to this.

Reply to Appellee's Argument headed: "III. The District Court correctly held that the Commissioner's assessment and collection of the penalty was proper."

Appellee agrees with Appellant as to the meaning of the word "willfully" as used in Section 1718 (c) of

the Internal Revenue Code of 1939. Where penalties are concerned, "willfully" means without reasonable cause. This issue was discussed at pages 55-59 of Appellant's brief.

Appellee states that Appellant did not have "reasonable cause" in view of the fact that the Deputy Commissioner of Internal Revenue disagreed with Appellant's tax advisers as to the applicability of Sec. 3469 to Appellant's limousine operations and in view of the fact that in the *Royce* case, the District Court had held that "appellant's limousine operations in Seattle, which were similar to those carried on in Portland, were subject to the transportation tax". Once again, Appellee has paid slight if any attention to the realities of this case and has ignored the facts.

In the first place, the informal opinion of a Deputy Commissioner of Internal Revenue does not have the force and effect of law and is not determinative as to the correct interpretation of the law. This was discussed in Appellant's brief at pages 55-59. Appellant was justified in following the advice of its independent tax attorneys. To do so was not unreasonable.

In the second place, Appellant was not a party to the *Royce* case and did not engage in the airport limousince operations in Seattle. The operations of the limousince company in Seattle were not similar to the manner in which Appellant conducted its operations, as shown at pages 25-28 of Appellant's brief.

Appellant has honestly and consistently taken the position that its limousine operations were not subject

to Sec. 3469. In doing so, it followed the advice of its attorneys. It kept complete records of its operations and made its records available to the government. Contesting the Commissioner's interpretation under such circumstances is reasonable, and is not willful. Appellant chose an honest course of action, one which it maintains to this day is correct. The law does not subject a taxpayer to the risk of a 100% penalty for such conduct as this.

CONCLUSION

Appellee has failed satisfactorily to answer Appellant's brief and the arguments made therein. Some of Appellant's points have gone unanswered. Appellant, in its brief, has shown that it was not operating its limousines "on an established line" within the meaning of Sec. 3469, that it did not pass the burden of the tax on to its limousine passengers, but carried the burden with its own funds, and that, at all times, Appellant acted with reasonable cause and business prudence in this matter. Therefore, the judgment of the trial court should be reversed.

Respectfully submitted,

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